Supreme Court, U.S.
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NO. 07-218

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER,

v.

LORENZO PICKETT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR LORENZO PICKETT IN OPPOSITION

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QUESTION PRESENTED

Whether, in sentencing a defendant convicted of a crack cocaine offense, a district court, pursuant to 18 U.S.C. § 3553(a), may take account of the fact that the Sentencing Commission has found that the guidelines for crack offenses result in sentences that are contrary to the factors set forth in § 3553(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 475 F.3d 1347.

JURISDICTION

The court of appeals entered its judgment on February 13, 2007. Petitions for rehearing and rehearing en banc were denied on May 21, 2007 (Pet. App. 22a-24a). Respondent's sentence was vacated and remanded for resentencing.

STATEMENT

This case concerns whether, when sentencing a defendant for a crack cocaine offense, a district court can take account of the Sentencing Commission's repeated findings that the crack guidelines conflict with a number of the sentencing factors of 18 U.S.C. § 3553(a). The court of appeals held that a district court could consider the Sentencing Commission's disavowal of the crack guidelines, and remanded the case for resentencing. Pet. App. 18a. This Court is considering a similar issue in Kimbrough v. United States, No. 06-6330, which was argued on October 2, 2007.

1. On May 24, 2001, respondent was charged in a two-count indictment in the United States District Court for the District of Columbia. Pursuant to a plea agreement, on November 27, 2003, he pleaded guilty to Count One, charging distribution of five or more grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(B)(iii). On March 27, 2003, the district court sentenced respondent to a 158-month term of imprisonment. Pet. App. 2a.

2. Respondent appealed, and the government agreed that his criminal history category was improperly calculated. Pet. App. 2a. The government thus filed a joint motion to remand the case for resentencing. On April 21, 2004, the case was remanded for resentencing. Pet. App. 2a.

3. The resentencing took place after this Court's decision in United States v. Booker, 543 U.S. 220 (2005). Respondent argued, among other matters, that the district court should not sentence him within the advisory guidelines range for crack cocaine in light of the Sentencing Commission's repudiation of those guidelines. Pet. App. 2a. The district court refused to consider the argument without guidance from the

court of appeals, and sentenced respondent to 121 months of imprisonment, the bottom of the advisory crack guidelines range. Pet. App. 2a-3a. Respondent again appealed, and argued that the district court erred in refusing to consider the disparity between the crack and powder cocaine guidelines at sentencing.

4. The court of appeals held that the district court erred, in light of this Court's decision in Booker, in refusing to even consider the disparity between crack and powder sentencing guidelines, and remanded the case for resentencing. Pet. App. 18a. In reaching its decision, the court noted that the Sentencing Commission was one of the "severest critics" of the disparity and that it has "strongly recommended against retaining the 100-to-1 ratio." Pet. App. 13a.

The court of appeals explained that the Commission has repeatedly pointed out that the crack guidelines do not comply with § 3553(a). Pet. App. 14a-15a. In addition, "Congress has had nothing to say" about what the proper ratio should be in the guidelines, and was "silent" about what the proper ranges should be between the "statutory minimums and maximums." Pet. App. 16a-17a.

ARGUMENT

1. The court of appeals vacated respondent's sentence and remanded the case to the district court for resentencing. Pet. App. 18a. The decision, therefore, is interlocutory, and the petition should, therefore, be denied. Hamilton-Brown Shoe Co. v. Wolf Bros & Co., 240 U.S. 251, 258 (1916). See also Virginia Military Institute v. United States, 508 U.S. 946 (1993) (Scalia, J., concurring). The court of appeals opinion does not require the district court to impose a lower sentence because of the unwarranted disparity between the crack and powder guidelines, but only to consider it.

The district court may decide not to reduce respondent's sentence. In addition, if the petition is denied, by the time this case is remanded and a resentencing takes place, this Court will likely have decided Kimbrough, which will guide the district court.

2. Petitioner asks solely that the "petition for a writ of certiorari in this case should be held pending the Court's decision in Kimbrough." Pet. App. 5. While it is unclear whether Kimbrough will answer the precise question presented to the court of appeals in this case, it appears that it will affect this case. Therefore, if the Court does not deny the petition for the reasons discussed above, respondent does not oppose petitioner's suggestion.

Respectfully submitted,

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